

Letter of Findings: 04-20170472
Gross Retail Tax
For the Years 2012, 2013, and 2014

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana Company provided sufficient documentation to show that the truck-tracking software used was not taxable. Indiana Company also provided two invoices to rebut the Department's position that Indiana sales tax was due on the tangible personal property.

ISSUE

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-5-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-5; IC § 6-2.5-1-24; *Rhoades v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 8 (December 2016).

Taxpayer protests the imposition of sales tax and use tax on tangible personal property.

STATEMENT OF FACTS

Taxpayer is a company that operates in Indiana. Taxpayer and its subsidiaries operate landscaping, horticulture, and industrial services in Indiana and throughout the country. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit for the years 2012, 2013, and 2014. The Department used a statistical sample to conduct the audit and determined that Taxpayer had not paid sales or use tax on some transactions during the audit period. The Department therefore issued proposed assessments of sales and use tax. Taxpayer protested the imposition of use tax on certain transactions. An administrative hearing was conducted and this Letter of Findings results. Further facts will be presented as required.

I. Sales and Use Tax—Imposition.

DISCUSSION

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

The Department conducted a statistical sample to determine whether Taxpayer owed additional sales or use tax. Taxpayer states that there are multiple transactions in which equipment was purchased outside Indiana and later delivered to Indiana and Indiana sales tax was paid or equipment was purchased outside Indiana and later delivered to Indiana in which Taxpayer did not pay sales tax. Taxpayer also stated that it purchased tangible personal property outside Indiana and was never used in Indiana. Taxpayer provided invoices, pictures, and an affidavit by its logistics director ("Director") to support its protest.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1 . . . or that is described in any other section of IC § 6-2.5-4." A retail transaction is defined as occurring when a person "acquires tangible personal property . . . and transfers that property to another person for consideration." IC § 6-2.5-4-1(b)(1)-(2). Additionally, IC § 6-2.5-4-1(c)(2) provides that it "does not matter whether the property is transferred . . . alone or in

conjunction with other property or services." Tangible personal property also includes prewritten computer software. IC § 6-2.5-1-27.

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over *tangible personal property*." IC § 6-2.5-3-1(a) (*Emphasis added*). The use tax is functionally equivalent to the sales tax. See *Rhoads v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002) (*Emphasis added*).

The relevant code IC § 6-2.5-3-5 provides that:

A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state, territory, or possession of the United States for the acquisition of that property.

Furthermore, IC § 6-2.5-1-27 specifies that:

"Tangible personal property" means personal property that:

- (1) can be seen, weighed, measured, felt or touched; or
- (2) is in any other manner perceptible to the senses.

The term includes electricity, water gas, steam, and *prewritten computer software*. (*Emphasis added*).

"Prewritten computer software" is defined in IC § 6-2.5-1-24 which provides in part as follows:

Subject to the following provisions, "prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser:

- (1) The combining of two (2) or more prewritten computer software programs or prewritten parts of the programs does not cause the combination to be other than prewritten computer software.

A. Sales Tax on Tangible Personal Property.

Taxpayer protested sales tax on tangible personal property ("TPP"). Taxpayer broke down its protest of TPP into three categories: assets purchased outside Indiana in which sales tax was paid at the time of purchase; assets purchased outside Indiana and use tax was later paid by Taxpayer; and, assets purchased outside Indiana in which Indiana sales or use tax was never paid. Taxpayer provided invoice WG016127 in its protest. The invoice shows that the 6 percent Georgia sales tax was paid at the time of purchase. Thus, pursuant to IC § 6-2.5-3-5 Taxpayer only owes 1 percent of Indiana sales tax on the TPP in invoice WG016127.

Taxpayer also provided an application for "certificate of title" for a Yukon, in which the application shows sales tax paid. Taxpayer listed the Yukon as asset number 80501 for the purpose of the Department's statistical sample. However the taxable amount listed in the statistical sample does not match the document provided by Taxpayer. According to the application for certificate of title sales tax was paid. However the Department cannot verify that this is the same asset 80501 listed in the statistical sample. Thus, the amount of tax due on asset 80501 is proper.

Taxpayer also provided invoice number 63063493 and listed the invoice as asset number 2Y617 for purposes of the Department's statistical sample analysis. The invoice shows Indiana sales tax paid. Therefore, Taxpayer is sustained regarding invoice number 63063493.

As far as the remaining protested items Taxpayer provided an excel sheet, labeled as "Exhibit A" and accompanying affidavit given by Taxpayer's Director. The Director states that:

8. The first category of assets includes those purchased by the [Taxpayer] outside of Indiana on which sales tax was paid by [Taxpayer] at purchase.

9. The second category of assets includes those purchased by the [Taxpayer] outside Indiana and those assets were later used by [Taxpayer] in Indiana.

10. The Third category of assets includes those purchased outside Indiana and which were never used by

[Taxpayer] in Indiana.

11. I provided the information contained in the spreadsheet based on the books and records of [Taxpayer].

Taxpayer however provided no bank statements, invoices, pictures, or any other evidence to support Director's assertions. Thus Taxpayer did not meet its burden for the remaining protested assets as required by IC § 6-8.1-5-1(c).

Taxpayer provided sufficient documentation to show that it only owes 1 percent of Indiana sales tax on invoice WG016127. Taxpayer also provided sufficient evidence to show that sales tax was paid at the time of purchase on invoice 63063493. Taxpayer however did not provide sufficient documentation to show that Indiana sales or use tax was not owed on the remaining protested assets.

B. Use Tax on Software.

Taxpayer also protested the assessment of use tax on software. The Department determined the software was part of a unitary transaction in which TPP was also purchased, and that this software was not part of service and is therefore taxable. Taxpayer protests this assessment stating that the software is a service.

IC § 6-2.5-1-27 specifies that:

"Tangible personal property" means personal property that:

- (1) Can be seen, weighed, measured, felt or touched; or
- (2) Is in any other manner perceptible to the senses.

The term includes electricity, water gas, steam, and *prewritten computer software*. (*Emphasis added*).

"Prewritten computer software" is defined in IC § 6-2.5-1-24 which provides in part as follows:

Subject to the following provisions, "prewritten computer software" means computer software, including prewritten upgrades that is not designed and developed by the author or other creator to the specifications of a specific purchaser:

- (1) The combining of two (2) or more prewritten computer software programs or prewritten parts of the programs does not cause the combination to be other than prewritten computer software.

Information Bulletin 8, (December 2016) provides a definition of "Software as a Service," ("SaaS") the Bulletin states, "SaaS is defined as a service provider hosting software application over the internet for a customer. The bulletin goes onto say:

The taxability of software that can be electronically accessed via the internet, either by remote access from a hosted computer or server or through a pool of shared resources from multiple computers and servers ("cloud computing"), without having to download the software to the user's computer, is not specifically addressed in the Indiana Code. Whether a transaction involving the use of "cloud-based" software is subject to Indiana sales or use tax depends on the facts and circumstances of each transaction, particularly with regards to the amount of control or possession the purchaser is granted in the software, the object of the transaction, and the ownership rights, if any, the purchaser has in the software. Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA; *see a/so*, Information Bulletin 8 (November 2011), 20111228 Ind. Reg. 045110765NRA.

Taxpayer explained the software is owned and maintained by the software provider. Taxpayer received a tracker for each of its trucks which tracked the trucks' routes, maintenance, time driving, etc. Taxpayer stated it purchased the right to access the software to gain information. Taxpayer did not own or control the software. Instead it accessed the information over the internet. Taxpayer provided information from the software provider and stated that it has already paid sales tax on any TPP that is provided as part of the service.

Based on the information provided by Taxpayer it is clear the software provided was part of service. The software provider's website as well as documents provided to the Department show that Taxpayer does not possess any ownership rights over the software. Taxpayer can only minimally manipulate the data provided through the software. Taxpayer was also able to show that sales or use tax was paid at the time of purchase for any TPP that was provided as part of the software. Thus, as explained in Information Bulletin 8, the protested software is not taxable as a service of the software provider. Taxpayer met its burden under IC § 6-8.1-5-1(c) and is sustained regarding its protest of software.

FINDING

Taxpayer's protest of sales tax for invoice WG016127 is adjusted so that only 1 percent of Indiana sales tax is due. Taxpayer's protest of sales tax regarding invoice 63063493 is sustained. Taxpayer's protest of software is sustained. Taxpayer's protest on the remaining assets is denied.

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